

California Regional Water Quality Control Board
North Coast Region

Cleanup and Abatement Order No. R1-2006-0044

For:

Mr. Kevin Barr – Summerwind Vineyard
Redwood Empire Vineyard Management
28301 Highway 128, Yorkville, Sonoma County, California

Regarding:

Unauthorized Discharges of Waste to Upper Dry Creek,
Yorkville, Mendocino County

The California Regional Water Quality Control Board, North Coast Region (hereinafter Regional Water Board), finds that:

1. Mr. Kevin Barr, owner of the Summerwind Vineyard Property, and Redwood Empire Vineyard Management, conducted unauthorized activities in Upper Dry Creek, which have resulted in the issuance of the following Cleanup and Abatement Order (Order).
2. This Order addresses discharges and potential discharges to Upper Dry Creek from land owned, operated or controlled by the persons named in paragraph number one (1) above, located at 28301 Highway 128, Yorkville, Mendocino County (hereinafter the “Site”).
3. Beginning in 2003, North Coast Regional Water Quality Control Board (Regional Water Board) staff member Scott Gergus began working with Mr. Kevin Barr on a proposal to install a new bridge crossing over Upper Dry Creek on the Site. During their interactions, Mr. Barr approached Mr. Gergus regarding erosion that was occurring on the Site, along the banks of Upper Dry Creek. At that time Mr. Gergus informed Mr. Barr of the permitting requirements involved in repairing the failing banks.
4. Some of the landuse activities on the property include a wet crossing through Upper Dry Creek, grazing of cattle, apple orchards along Upper Dry Creek, vineyard development, and the installation of a bridge crossing in 2004, though it appears the wet crossing is still being used, for unknown reasons. Some of these landuse activities appear to have lead or contributed to channel instabilities and increased erosion on the Site along the banks of Upper Dry Creek.
5. On October 11, 2005, Mr. Gergus was contacted by Mr. Barr’s secretary Michelle Buchignani, regarding a proposal to perform a bank stabilization project along the banks of Upper Dry Creek, within the property. Mr. Barr had been working with staff from the California Department of Fish and Game (DFG) for several years to obtain approvals for the proposed project. Mr. Barr had not yet submitted an application to the Regional Water Board for the proposed project.
4. On October 25, 2005, Regional Water Board staff members Mr. Gergus and Andrew Jensen met with Mr. Tyler Klick and Mr. Kevin Barr (Owner) of Redwood Empire Vineyard Management (REVM) and Summerwind Vineyards, at the Summerwind

Vineyard Property (Site) to discuss the eroding streambanks, the proposed stabilization project, and associated permitting requirements. Mr. Barr showed Mr. Gergus and Mr. Jensen the failing streambanks and the permitting process of the Regional Water Board was discussed. As stated above in Finding #3 above, Mr. Gergus reminded Mr. Barr, that if stabilization measures were going to be implemented along Upper Dry Creek, a Clean Water Act Section 401 permit (CWA 401) would need to be obtained prior to the onset of work activities. Mr. Jensen told Mr. Barr that to conduct the stabilization project, which includes the installation of rock rip rap, and bioengineering techniques, he would need to apply for a Clean Water Act Section 401 permit from the Regional Water Board, and that the approval process can take up to 4-6 months. Mr. Barr asked what would happen if he made a new channel in the streambed, using heavy equipment, to move the flow away from the eroding banks. Both Mr. Gergus and Mr. Jensen told Mr. Barr that those activities would require permits and that failing to get a permit could result in an enforcement action.

At the time of this visit, staff observed that the streambanks throughout the Site were severely eroded, and one section in particular was of concern for both Mr. Gergus and Mr. Jensen. This area is referred to as Site 2 in the Project Description submitted to the Regional Water Board by Mr. Barr on December 5, 2005. The Project Description included the repair of the Site 2 failing bank by using riprap up to a height of 4 feet above grade, and installation of willow cuttings to be placed around, under and in front of the riprap. In addition, the plans called for installation of willow mats to be placed perpendicular to the eroded bank. All willows were to be irrigated for the first three years during the dry season. The eroded section of bank along Site 2 was approximately 12 feet high and 200 feet long, was right up against the property fence line, and further erosion would threaten 2 large live oak trees, the property fence, an international fiber optic line, telephone and electric lines, and State Highway 128. Staff felt that the need for repair on this section of eroding bank might constitute an emergency, and told Mr. Barr that the Regional Water Board would work with him to expedite the permitting process for stabilizing this section of bank failure. Staff also notified Mr. Barr that he needed to get approvals for an emergency project from the Army Corps of Engineers (ACOE) and DFG, and apply for 401 coverage from the Regional Water Board.

Staff indicated a willingness to expedite approval of 401 coverage as much as possible, as an emergency project, so long as it was implemented exactly as the proposal for the upstream sections of streambank (Site 1), and a formal application for the project would be submitted. Mr. Barr stated that he would contact the ACOE and DFG to get their approvals and would also submit an application for a CWA 401 for Site 1 and Site 2.

5. On October 31, 2005, the Regional Water Board received an informal application packet, which lacked the formal Regional Water Board application form, and associated fees, for a CWA 401 permit. The application packet included a project description and design plans for Site 1, which involved some placement of riprap at the toe of slope, and installation of willow baffles to stabilize the eroding banks. The packet did not contain a specific proposal for Site 2, as requested by Regional Water Board staff.

6. On November 16, 2005, following a good deal of correspondence, Mr. Jensen gave written staff assent, via email, for the emergency work to begin on Site 2, with the understanding that the work would be constructed in a manner consistent with the Site 1 workplans, as included in the informal CWA 401 application submitted on October 31, 2005, and that design plans for Site 2 specifically would be sent within the next couple of days.
7. On November 22, 2005, Mr. Barr submitted the requested Site 2 Emergency Workplan for review (Workplan), and agreed to send any additional design information regarding this proposed work. The Workplan contained the design for the work to be performed, the project description and pictures of the site, and was consistent with discussions staff had with Mr. Barr. In summary, proposed project included the repair of the Site 2 failing bank by using riprap up to a height of 4 feet above grade, and installation of willow cuttings to be placed around, under, and in front of the riprap. In addition, the plans called for installation of willow mats to be placed perpendicular to the eroded bank
8. According to Mr. Barr, work on the Site commenced November 23, 2005, and then crews were off for Thanksgiving on November 24, 2006, and rain began the following day.
9. On November 27, 2005, DFG staff took photos of the work being done within the creek and along Site 2, which included dredging of the channel to create a new wetted channel. The performed work did not follow the submitted Workplan for Site 2, and resulted in significant discharges and impacts to Upper Dry Creek. There were large piles of earthen material that had been dredged out of the newly constructed channel that were left within the channel and would mobilize during the next rainfall event (See photographs in Exhibit 1).
10. Turbidity samples were taken by DFG staff on November 29, 2005, above and below the work area and results include:

1.82 NTUs above work area (baseline)

171 NTUs below work area
11. On November 30, 2005, Ms. Corrine Gray of California Department of Fish and Game **conducted** a field inspection, work was still being conducted in the active channel, and Ms. Gray told Mr. Barr to cease operations and restore the stream channel.
12. Pictures taken on December 1, 2005 by DFG staff, made clear Mr. Barr was not following his submitted Workplan, agreements that had made with him in the field during the earlier October 25, 2005 inspection, or the November 16, 2005 informal staff agreement. From the date the discharges commenced on November 23, 2005, up to and including the date of the issuance of this order, there was and is no complete 401 permit application or approved permit.
13. On March 6, 2006, DFG Game Warden Karen Maurer observed concrete K-rails in the recently pushed up gravels along the bank of Site 2 (See photos in Exhibit 2). It appears

that concrete K-rails and potentially other debris have been deposited to and buried in the gravels pushed up against the bank of Site 2. Placement of such waste was not approved and would not be a permissible activity.

14. Upper Dry Creek as described above is within the Russian River Watershed, and has actual and potential beneficial uses, as designated in the Water Quality Control Plan for the North Coast Region (Basin Plan), that include:
 - a. Municipal and domestic supply
 - b. Agricultural supply
 - c. Industrial supply
 - d. Groundwater recharge
 - e. Freshwater replenishment
 - f. Navigation
 - g. Water contact recreation
 - h. Non-contact water recreation
 - i. Warm freshwater habitat
 - j. Cold freshwater habitat
 - k. Rare, threatened, or endangered species
 - l. Wildlife habitat
 - m. Migration of aquatic organisms
 - n. Spawning, reproduction, and/or early development
 - o. Flood peak attenuation/Flood water storage
15. The Basin Plan contains specific standards and provisions for maintaining high quality waters of the state that provide for the beneficial uses listed above. The Action Plan for Logging, Construction and Associated Activities (Action Plan) included in the Basin Plan includes two prohibitions:
 - Prohibition 1 - *“The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited.”*
 - Prohibition 2 - *“The placing or disposal of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature at locations where such material could pass into any stream or watercourse in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses is prohibited.”*
16. The Action Plan states: “where investigations indicate that the beneficial uses of water may be adversely affected by waste discharges, the staff shall require the submission of Reports of Waste Discharge.”

17. Section 3 of the Basin Plan contains water quality objectives that specify limitations on certain water quality parameters not to be exceeded as a result of waste discharges. The water quality objectives (pages 3-2.00 and 3-3.00) that are considered of particular importance in protecting the beneficial uses from unreasonable effects due to discharges from logging, construction, or associated activities, include the following:
- Color: Waters shall be free of coloration that causes nuisance or adversely affects beneficial uses.
 - Suspended Material: Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.
 - Settleable Material: Waters shall not contain substances in concentrations that result in deposition of material that causes nuisance or adversely affect beneficial uses.
 - Sediment: The suspended sediment load and suspended discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.
 - Turbidity: Turbidity shall not be increased more than 20 percent above naturally occurring background levels. Allowable zones within which higher percentages can be tolerated may be defined for specific discharges upon the issuance of discharge permits or waiver thereof.
18. The following sections of the Porter-Cologne Water Quality Control Act authorize the Regional Water Board to require persons to remediate unpermitted discharges of waste:
- Section 13267(a) - *“A regional board, in establishing or reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement or authorized by this division, may investigate the quality of any waters of the state within its region.”*
 - Section 13267(b) - *“In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or proposes to discharge waste within its region...that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires.”*
 - Section 13267(c) - *“In conducting an investigation pursuant to subdivision (a), the regional board may inspect the facilities of any person to ascertain whether the purposes of this division are being met and waste discharge requirements are being complied with. The inspection shall be made with the consent of the owner or possessor of the facilities or, if the consent is withheld, with a warrant duly issued pursuant to the procedure set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure. However, in the event of an emergency affecting*

the public health or safety, an inspection may be performed without consent or the issuance of a warrant.”

- Section 13304(a) - *“Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.”*
19. The discharge of sediment into Upper Dry Creek related to the excavation, new channel construction, stockpiling of gravel material, and inadequate stabilization measures, and subsequent direct loss of stream habitat and its associated functions was in amounts deleterious to wildlife, and other beneficial uses, and therefore violates Prohibitions 1 and 2 in the Action Plan. These detrimental effects also constitute the creation of pollution or nuisance. The discharge of the sediment material is therefore subject to cleanup and abatement under California Water Code Section (CWC) 13304.
 20. As described above, the Discharger has discharged waste into Upper Dry Creek in amounts deleterious to beneficial uses.
 21. A restoration Workplan required by this Order is necessary to ensure that the prior harm and ongoing and future threat to water quality created by the discharges described above are properly abated and controlled.
 22. The impacts to water quality and beneficial uses arising from the above-described activities have been significant and will continue until the source of the impacts are adequately abated. Protection of, and remediation of impacts to, beneficial uses have economic and non-economic value to downstream residents and the public at large. The costs associated with the preparation of the technical reports required by this order are likely to be significant, on the order of thousands of dollars. These costs, however, are necessary to remediate the water quality problems created by the Dischargers at this Site, and to minimize the risk of additional damage to water quality. As required by Water Code section 13267(b)(1), the burden of producing the technical reports required by this order bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports.
 23. This is an enforcement action by a regulatory agency, being taken for the protection of the environment, and is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code, Section 21000 et seq.) in accordance with California Code of Regulations (CCRs), Title 14, Sections 15308 and 15321.

24. Failure to comply with the terms of this Order may result in enforcement under the CWC. Any person failing to provide technical reports containing information required by this Order by the required date(s) or falsifying any information in the technical reports is, pursuant to CWC Section 13268, guilty of a misdemeanor and may be subject to administrative civil liabilities of up to one thousand dollars (\$1,000.00) or civil liabilities imposed in superior court of up to five thousand dollars (\$5,000), for each day in which the violation occurs. Any person failing to cleanup or abate threatened or actual discharges as required by this Order is, pursuant to CWC Section 13350(e), subject to administrative civil liabilities of up to five thousand dollars (\$5,000.00) per day or ten dollars (\$10) per gallon of waste discharged or civil liabilities imposed in superior court of up to fifteen thousand dollars (\$15,000) per day or twenty (\$20) per gallon of waste discharged.
25. Any person affected by this action of the Regional Water Board may petition the State Water Resources Control Board (State Water Board) to review the action in accordance with CWC Section 13320 and Title 23, CCRs, Section 2050. The State Water Board must receive the petition within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request. In addition to filing a petition with the State Water Board, any person affected by this Order may request the Executive Officer to reconsider this Order. To be timely, such request must be made within 30 days of the date of this Order. Note that even if reconsideration by the Executive Officer is sought, filing a petition with the State Water Board within the 30-day period is necessary to preserve the petitioner's legal rights. If you choose to request reconsideration of this Order or file a petition with the State Water Board, be advised that you must comply with the Order while your request for reconsideration and/or petition is being considered.

THEREFORE, IT IS HEREBY ORDERED that, pursuant to CWC Sections 13267(b) and 13304:

The Discharger shall prepare and submit the following technical reports, and perform the following cleanup and abatement actions:

1. Submit a Workplan, prepared by a qualified individual with background in stream morphology and restoration, to deal with the long-term stabilization and restoration of the entire reach of affected stream on this Site (Sites 1 and 2), with mitigation measures to address the recent sediment discharges and related impacts to the beneficial uses of Upper Dry Creek, for Executive Officer concurrence, on or before May 5, 2006, that includes the following:
 - a. A detailed stabilization, restoration and mitigation plan that remediates the damage from the unapproved instream activities, and addresses the timely stabilization, restoration and mitigation of the affected stream habitat. The plan shall contain a time schedule for all activities, success criteria to judge the success of the overall project, and a monitoring proposal to evaluate whether the success criteria are being met. The plan shall encompass the entire affected reach of stream on this Site, including Sites 1 and 2. In addition, the plan shall support the beneficial uses of Upper Dry Creek.

- b. A plan to provide additional mitigation to account for the temporal loss of stream habitat and associated beneficial uses that has occurred as a result of the unauthorized discharges. Such mitigation can include additional restoration and/or enhancement of stream habitat elsewhere in the watershed on the Summerwind Vineyards Ranch.
 - c. A copy of the California Department of Fish and Game Streambed Alteration Agreement application and/or final agreement.
 - d. A copy of the U.S. Army Corps of Engineers Clean Water Act Section 404 application and/or permit.
2. The long-term Workplan shall be implemented, following Executive Officer written concurrence, and completed no later than October 15, 2006.

If, for any reason, the Dischargers are unable to perform any activity or submit any documentation in compliance with the deadlines in the Workplan implementation schedule submitted pursuant to this Order and concurred with by the Executive Officer, the Dischargers may request, in writing, an extension of the time as specified. The written extension request shall include justification for the delay and shall be received by the Regional Water Board not less than 15 calendar days prior to the deadline sought to be extended. An extension may be granted for good cause, in which case this Order will be accordingly revised.

This CAO in no way limits the authority of this Regional Water Board to institute additional enforcement actions or to require additional investigation and cleanup at the facility consistent with California Water Code. This CAO may be revised by the Executive Officer as additional information becomes available.

Ordered by _____
Catherine E. Kuhlman
Executive Officer

April 5, 2006

Exhibit 1 – Site Photos taken by Regional Water Board and California Fish and Game staff.

Photo 1. View facing upstream towards active work in the Upper Dry Creek Channel. December 2005 (Photo taken by Corrine Gray of DFG)



Photo 2. View facing downstream towards heavy equipment constructing a new channel that was not authorized. December 2005 (Photo taken by Corrine Gray of DFG).



Photo 3. Unauthorized construction of a temporary road through active wetted channel of Upper Dry Creek. December 2005 (Photo taken by Corrine Gray of DFG).



Photo 4. Stockpiled sediment and gravel from unauthorized construction of a new active wetted channel in Upper Dry Creek. December 2005 (Photo taken by Corrine Gray of DFG).



Photo 5. Turbidity samples taken by DFG staff above (left) and below (right) active work area. December 2005 (Photo taken by Corrine Gray of DFG).



Photo 6. Work completed along Site 2 that was not performed as proposed in the Clean Water Act Section 401 permit application submitted to the Regional Water Board. December 2005 (Photo taken by Andrew Jensen of Regional Water Quality).



Exhibit 2. Site Photos taken by DFG Warden Keren Maurer.

Photo 1. View of concrete K-rail buried in the gravels that were pushed up against the bank along Site 2. (Photo by Karen Maurer, March 6, 2006)



Photo 2. Erosion of gravels behind concrete K-rail. (Photo by Karen Maurer, March 6, 2006)



Photo 3. Overview of concrete K-rail buried in the streambank, with active erosion of gravels occurring. (Photo by Karen Maurer, March 6, 2006)



Photo 4. View facing downstream towards K-rail buried in the streambank. (Photo by Karen Maurer, March 6, 2006)

